IN THE

Supreme Court of the United States

October Term, 1957.

No. 117.

DORA STEWART LEWIS, MARY WASHINGTON STEWART BORIE and PAULA BROWNING DENCKLA,

Petitioners,

v.

ELIZABETH DONNER HANSON, as Executrix and Trustee under the Last Will of Dora Browning Donner, Deceased, et al.,

Respondents.

On Writ of Certiorari to the Supreme Court of the State of Delaware.

BRIEF FOR THE PETITIONERS.

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DORA STEWART LEWIS, MARY WASHINGTON STEWART BORIE and PAULA BROWNING DENCKLA,

Petitioners,

v.

ELIZABETH DONNER HANSON, as Executrix and Trustee Under the Last Will of Dora Browning Donner, Deceased,

WILMINGTON TRUST COMPANY, a Delaware Corporation, as Trustee Under Three Separate Agreements, (1) and (2) With William H. Donner Dated March 18, 1932 and March 19, 1932, and (3) With Dora Browning Donner Dated March 25, 1935,

DELAWARE TRUST COMPANY, a Delaware Corporation, as Trustee Under Three Separate Agreements, (1) With William H. Donner Dated August 6, 1940, and (2) and (3) With Elizabeth Donner Hanson, Both Dated November 26, 1948,

KATHERINE N. R. DENCKLA,

ROBERT B. WALLS, JR., ESQUIRE, Guardian ad Litem for Dorothy B. R. Stewart and William Donner Denckla,

ELWYN L. MIDDLETON, Guardian of the Property of Dorothy B. R. Stewart, a Mentally Ill Person,

EDWIN D. STEEL, JR., ESQUIRE, Guardian ad Litem for Joseph Donner Winsor, Curtin Winsor, Jr., and Donner Hanson,

BRYN MAWR HOSPITAL, a Pennsylvania Corporation, MIRIAM V. MOYER, JAMES SMITH, WALTER HAMILTON, DOROTHY A. DOYLE, RUTH BRENNER and MARY GLACKENS,

LOUISVILLE TRUST COMPANY, a Kentucky Corporation, as Trustee for Benedict H. Hanson, and as Trustee Under Agreements With William H. Donner,

WILLIAM DONNER ROOSEVELT, JOHN STEWART and BENEDICT H. HANSON,

Respondents.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF DELAWARE

BRIEF FOR THE PETITIONERS.

OPINIONS BELOW [1]

The opinion of the Supreme Court of the State of Delaware (A222-244) [2] is reported at Del. , 128 A. 2d 819. The opinion of the Court of Chancery of the State of Delaware (A173-190) is reported at Del. Ch. , 119 A. 2d 901.

JURISDICTION.

The mandate of the Supreme Court of the State of Delaware was stayed by virtue of an order dated February 7, 1957, to permit petitioners to apply for a writ of certiorari (A248-249). The petition was filed on May 7, 1957, and was granted on June 17, 1957 (354 U. S. 920). The jurisdiction of this Court is invoked under 28 U. S. C. § 1257 (3).

QUESTIONS PRESENTED.

1. Did not the Supreme Court of the State of Delaware err when it refused to accord full faith and credit to the judgment of the Supreme Court of the State of Florida?

2. Did not the Supreme Court of the State of Delaware err in holding the trust agreement of March 25, 1935, and the exercise of certain powers of appointment thereunder, valid?

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1. A companion case in this Court is an appeal from the Supreme Court of the State of Florida filed on April 17, 1957. It is captioned in this Court: "Elizabeth Donner Hanson, Individually, as Executrix of the Will of Dora Browning Donner, deceased, et al., Appellants, vs. Katherine N. R. Denckla, Individually, and Elwyn L. Middleton, as Guardian of the Property of Dorothy Browning Stewart, Etc. No. 107, October Term, 1957." The question of jurisdiction in said case was postponed on June 17, 1957, and this Court ordered that the case be consolidated with this case and a total of two (2) hours allowed for oral argument. The opinion of the Supreme Court of the State of Florida in said case (A207-218) is unreported.

2. References to the Transcript of Record will be (A—).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.

The petition involves the meaning and effect of Article 4, § 1, of the United States Constitution (the Full Faith and Credit Clause), as made applicable by Rev. Stat., § 905; 28 U. S. C. § 1738.

STATEMENT OF THE CASE.

Dora Browning Donner moved from Pennsylvania to Florida in 1944, and took up residence (A74). She continued to reside in Florida until she died on November 20, 1952, a citizen, resident of, and domiciled in the State of Florida, leaving a Last Will and Testament dated December 3, 1949 (A3, 74). Her Will named her daughter, respondent Elizabeth Donner Hanson, a Florida resident, as Executrix and, after disposing of personal effects, divided the residuary estate into two parts: one to Delaware Trust Company of Wilmington, Delaware, as trustee under a trust for the benefit of another daughter, Katherine N. R. Denckla Ordway, and the other part to daughter Elizabeth Donner Hanson, but as trustee for the benefit of still another daughter, Dorothy B. Rodgers Stewart (A14-20). The Will was duly admitted to probate in the County Judges' Court in Palm Beach County, Florida, on December 23, 1952 and the Executrix, qualified (A3, 73).

Prior to the execution of the Will, and while she was a resident of Pennsylvania, Mrs. Donner had entered into an agreement dated March 25, 1935 (hereinafter called trust agreement), with Wilmington Trust Company of Wilmington, Delaware, the named trustee therein (A21). Under said trust agreement the trustee was to pay the net income to the trustor during her lifetime and, upon her death, to assign and deliver the trust fund unto such persons and in such manner and amounts as she should have appointed (1) by the last written instrument in writing executed by her and delivered to Wilmington Trust Company or (2), failing any such appointment, by her Last Will and Testament (A22). The trust agreement provided that Mrs. Donner could amend, alter, or revoke it in whole or in part at any time or times. The trust agreement also provided that the trustee could act only with the written direction or consent of the adviser of the trust and Mrs. Donner retained the right to nominate any additional advisers or change ad-

visers during her lifetime. She also retained other broad powers, including the power to remove the trustee (A21-29). The net result of the cumulative retained powers and the manner whereby the trust was administered was to create the relationship of principal and agent between Mrs. Donner and the named so-called trustee, Wilmington Trust Company (A127-156).

Mrs. Donner purported to exercise the power of appointment contained in the trust agreement by executing and delivering to Wilmington Trust Company an instrument dated December 3, 1949, which was the same day as the execution of her Will, directing the manner whereby the trust fund should be distributed. This instrument was amended in a minor respect on July 7, 1950 (A30-34, 35-37). The exercise of the power in 1949, and the amendment in 1950, while she was a resident of Florida, constituted republications in Florida of the original trust agreement (A213). The appointment of December 3, 1949, as amended on July 7, 1950,[3] provided for a plan of distribution which, insofar as the same is material in this cause,[4] directed the trustee, Wilmington Trust Company, to pay over the sum of $400,000.00 to Delaware Trust Company under two separate trusts dated November 26, 1948, created by her daughter, Elizabeth Donner Hanson, for the benefit of her sons, Joseph Donner Winsor and Donner Hanson, in equal amounts, and the remainder to her as Executrix (A30-34, 35-37).

The Will did not provide for the payment of said sum of $400,000.00 and, accordingly, if said power of appointment was invalid, the entire $400,000.00 should also have gone to Mrs. Hanson as Executrix and become part of the residuary estate. The dispute involved is whether the

3. Other earlier attempts were made to exercise the power of appointment, but were revoked by the December 3, 1949, appointment. Many of the parties named below were named because provisions had been made for them in early revoked powers of appointment (A38-44, 45-46).

4. Dispositions other than those material herein totaling $17,000.00 were included.

$400,000.00 should have gone as provided by said power of appointment or as provided under the Will.

After Mrs. Donner's death, a dispute arose with respect to what assets passed under Mrs. Donner's Will in the State of Florida. The assets held by Wilmington Trust Company under the trust agreement totaled $1,493,629.91 (A104). On June 26, 1953, the Executrix filed her inventory in Florida and included therein, as assets of the Florida estate, all property held by Wilmington Trust Company under the trust agreement (A170).

A declaratory judgment action was commenced on January 22, 1954, in the Circuit Court for Palm Beach County, Florida, by Katherine N. R. Denckla and Elwyn L. Middleton, guardian of the property of Dorothy B. R. Stewart, against Wilmington Trust Company, Delaware Trust Company and other parties. The other parties were direct and contingent beneficiaries under said purported power of appointment and under previous powers of appointment and also direct and contingent beneficiaries under the Will [5] (A70-82). Of the named Defendants, Elizabeth Donner Hanson, individually and as Executrix under the last Will and Testament of Mrs. Donner, and as guardian for Donner Hanson, Joseph Donner Winsor and William D. Roosevelt, appeared (A172). Wilmington Trust Company and Delaware Trust Company, in their individual corporate capacities and as trustees were served by publication and by mail (A172; F. R. 37-39) [6], but chose not to appear or answer.

The Florida Circuit Court held, on January 14, 1955, that, as between the appearing parties the trust instrument

5. One remote, contingent beneficiary under the purported power of appointment, Curtin Winsor, Jr., was not named. He was represented by his mother, who was guardian *ad litem* for the primary beneficiaries, and he was also represented as a member of a class. *Hansberry v. Lee*, 311 U. S. 32, 85 L ed 22.

6. References to the transcript of record on the appeal from the Florida Supreme Court, No. 107, will be (F. R. —). Said transcript of record has been supplemented to show that the complaint in the Florida case was mailed to all nonresidents.

and powers of appointment exercised in 1949 and 1950 were invalid and that the trust fund passed under the residuary clause of the will of Mrs. Donner. The Court held further that if had no jurisdiction over the non-appearing defendants (A83-85).

Upon appeal to the Supreme Court of the State of Florida, that Court affirmed the Circuit Court on September 19, 1956, as to the invalidity of the 1949 and 1950 powers of appointment and the trust agreement, but reversed with respect to the jurisdiction of the Court over non-answering defendants (A207-218).

Elizabeth Donner Hanson, the Executrix, apparently fearing that, although she was the Executrix, a Florida resident and Florida domiciliary, she might, in some way, be unfairly treated by the Florida Courts, filed an action for a declaratory judgment in the Court of Chancery of the State of Delaware on July 28, 1954, praying that the Court determine the persons entitled to participate in the fund, under the Trust agreement and under her mother's powers of appointment of 1949 and 1950 (A3-46). The parties named in the Delaware action are almost identical with those named in the Florida action with the exception that certain servants of Mrs. Donner and Curtin Winsor, Jr., were named as defendants who were not named in the Florida action.

Both corporate trustees, Wilmington Trust Company and Delaware Trust Company, Joseph Donner Winsor, Curtin Winsor, Jr., Donner Hanson, Dorothy B. R. Stewart, William Donner Denckla, Dora Stewart Lewis, Mary Washington Stewart Borie and Paula Browning Denckla appeared in person or by guardians *ad litem* in the Delaware action and filed answers (A47-69). Petitioners' answer is set forth at A60-69. Petitioners, together with Robert B. Walls, Jr., guardian *ad litem* for Dorothy B. R. Stewart and William Donner Denckla, comprised what the Delaware Supreme Court called the "Lewis group". The other defendants and the plaintiff were called the "Hanson group".

The Lewis group contends that the trust agreement is invalid and the exercise of the 1949 and 1950 powers of appointment were testamentary and ineffective to pass any interest, and that, therefore, the entire trust fund should have passed under the Will of the decedent.

The Hanson group on the other hand maintains that the trust is valid and the transfer of the $400,000.00 by the Wilmington Trust Company pursuant to the exercise of the 1949 power of appointment was sufficient to pass title. Adoption of either group's contention would financially benefit the members of that group.

The Delaware Court of Chancery granted summary judgment (A191-198) in favor of the Hanson group on January 13, 1956, directly in the face of the prior Summary Final Decree of the Florida Circuit Court entered on January 14, 1955, in favor of the Lewis group (A83-85). On appeal the Delaware Supreme Court affirmed on February 7, 1957, and thus held for the Hanson group (A222-249) even though the Florida Supreme Court previously had held for the Lewis group on September 19, 1956 (A207-218). Both Delaware courts refused to give full faith and credit to the Florida judgment.

CHRONOLOGICAL SUMMARY OF FACTS.

1935. On March 25, 1935, Dora Browning Donner, while a resident of Pennsylvania, executed the trust agreement, and deposited securities thereunder with Wilmington Trust Company of Wilmington, Delaware, the named trustee (A 7-8, 21-29, 74-75). She reserved broad powers in the trust agreement including, *inter alia*, (a) power to remove the trustee; (b) power to terminate and revoke the trust, and (c) power to designate beneficiaries at her death (A21-29).

1944. Mrs. Donner moved from Pennsylvania to Florida and established residence and continued as a Florida resident until she died (A74, 208).

1949. On December 3, 1949, Mrs. Donner executed a Last Will and Testament naming her daughter Elizabeth Donner Hanson Executrix (A3, 14-20).

On December 3, 1949, Mrs. Donner also exercised a power of appointment providing for the disfribution of the assets held by Wilmington Trust Company, as trustee under the trust agreement, to certain named beneficiaries (A30-34).

1950. Mrs. Donner again exercised a power of appointment under the trust agreement making a minor change in the 1949 designation. This was done on July 7, 1950 (A35-37).

1952. Mrs. Donner died on November 20, 1952. Her Will was duly admitted to probate on December 23, 1952, in the County Judges' Court in and for Palm Beach County, Florida, and her daughter, Elizabeth Donner Hanson, qualified as Executrix (A3).

1953. On June 26, 1953, the Executrix filed her Inventory and included therein, as assets of the estate, all property held by Wilmington Trust Company under the trust agreement, as the same was amended in 1949 and 1950 (A170). At the time, the assets held by Wilmington Trust Company under said trust agreement totaled $1,493,629.91 (A 104).

1954. On January 22, 1954, an action was started in the Circuit Court for Palm Beach County, Florida by beneficiaries under Mrs. Donner's Will for a declaratory judgment to ascertain what assets passed under the Florida Will, and, in that connection, to determine the validity or invalidity of the trust agreement (A70-82).

On July 28, 1954, the Florida Executrix filed an action in the Court of Chancery of the State of Delaware for a declaratory judgment to ascertain what assets passed under the Florida Will, and in that connection, to determine the validity or invalidity of the trust agreement (A3-46).

1955. On January 14, 1955, the Florida Circuit Court entered a Summary Final Decree holding that the trust agreement was invalid and that all the assets held by Wilmington Trust Company passed under the Will (A83-85).

1956. On January 13, 1956, the Delaware Court of Chancery granted a Summary Judgment holding the trust agreement valid and that the assets held by Wilmington Trust Company were distributable under the trust agreement (A191-198).

On September 19, 1956, the Florida Supreme Court affirmed the Florida lower court and held the trust agreement invalid and that the Florida Court had jurisdiction over the subject matter and persons of non-answering defendants (A207-218).

1957. On February 7, 1957, the Delaware Supreme Court affirmed the Delaware Court of Chancery and held the trust agreement valid and that the Florida Court had no jurisdiction over non-answering defendants (A222-249).

On February 21, 1957, an appeal was taken from the decision of the Florida Supreme Court to this Court and is presently pending as a companion case to this case (Footnote 1, p. 2).

The petitioners herein filed a petition for a writ of certiorari on May 7, 1957, which was granted on June 17, 1957. 354 U. S. 920.

SUMMARY OF ARGUMENT.

As shown above, the Florida Circuit Court first held the trust agreement to be invalid. The Delaware Court of Chancery then held it to be valid. Following that, the Florida Supreme Court held the trust agreement to be invalid. After that, the Delaware Supreme Court held the trust agreement to be valid.

Both the Delaware lower court and the Delaware Supreme Court refused to follow the prior adjudications on the point by the Florida Courts. The Delaware Supreme Court specifically rejected petitioners' contention that the Florida judgment was entitled to full faith and credit (A 236-241). Petitioners contend that the Delaware Supreme Court erred when it refused to give full faith and credit to the judgment of the Florida Supreme Court that the trust agreement was invalid.

ARGUMENT.

1. The Supreme Court of the State of Delaware Erred When It Refused to Accord Full Faith and Credit to the Judgment of the Supreme Court of the State of Florida.

Both the Florida Supreme Court and the Delaware Supreme Court dealt with the facts set forth above which, for all pertinent purposes, are undisputed (A208, 225, 228). The two courts dealt with the same facts and the same authorities and contentions and arrived at diametrically opposite judgments. This irreconcilable conflict between the Florida Supreme Court and the Delaware Supreme Court was recognized by the Delaware Court when it characterized these cases as "a headlong jurisdictional collision between states" (A228).

The judgment of the Florida Supreme Court came first and we urged below that it should have been given full faith and credit (A238-244).

Where a judgment rendered in one state is challenged in another, the only questions open to inquiry are "a want of jurisdiction over either the person or the subject matter . . ." *Milliken v. Meyer*, 311 U. S. 457, 462; 85 L ed 278, 282.

Neither the Delaware Supreme Court nor the respondents in this case have questioned the jurisdiction of the Florida Court over the subject matter. The action started in the Circuit Court for Palm Beach County, Florida was for a declaratory judgment to determine what portion of the trust property held by Wilmington Trust Company, under the trust agreement, should have passed under the residuary clause of the Florida Will of Mrs. Donner (A 82).

There can be no question but that the Florida Court had stature to take jurisdiction over this question. The Circuit Courts of the State of Florida are specifically given

jurisdiction and powers by the Constitution of that State. *Florida Statutes Annotated*, Constitution Art. 5, Sec. 11. The Courts are granted original jurisdiction in all cases in equity and at law not cognizable by the inferior courts. It was held in *State, ex rel. B. F. Goodrich Co. v. Trammell*, 140 Fla. 500, 192 So. 175 that the Circuit Courts have exclusive jurisdiction over such cases.

Section 87.02 of Chapter 87 of Florida Statutes Annotated deals with declaratory decrees and provides that any person claiming to be interested or who may be in doubt as to his rights under a will, may have *any question* of construction or *validity* arising under such will determined and obtain a declaration of his rights thereunder.

Since Dora Browning Donner died a citizen of and domiciled in Florida, it is apparent that the Circuit Court had jurisdiction to hear the suit for Declaratory Judgment brought in equity in Florida to determine what property passed under her Will.

The Florida Supreme Court said:

> "We shall first consider the contention of appellants that the circuit court of Palm Beach County erred in holding the trust and the powers of appointment exercised thereunder invalid as testamentary in character. As a preliminary inquiry, it is necessary to determine whether or not jurisdiction existed in the courts of Florida to pass upon the validity of these instruments.
>
> "There can be no doubt that the court below possessed substantive jurisdiction to determine this issue. Jurisdiction existed by virtue of the will, which had been duly probated in Florida, the testatrix' domiciliary state. Reference having been made in the will, as we have seen, to powers of appointment, and the question of effective exercise thereof having been properly raised, the chancellor below had no alterna-

tive but to examine the trust instrument and documents executed thereunder and declare them valid or invalid. This is to be distinguished from a case wherein questions of administration or validity of a purported inter vivos trust arise absent a will or any reference therein. Cf. *Wilmington Trust Co. v. Wilmington Trust Co.*, Del., 24 A. 2d 309, wherein the settlor had executed a will 'making no reference whatever to the power of appointment conferred on him by the (previously executed) trust agreement . . .' and it was held that the Delaware courts had jurisdiction to determine the validity of trust powers, although the settlor died a domiciliary of another state. In the case now presented, it would have been an abdication or abandonment of jurisdiction, which we would have been obliged to correct, if the chancellor below had failed to answer the question which was duly brought before him for adjudication." (A210-211).

The question of jurisdiction of the Florida Court over the persons of Wilmington Trust Company and Delaware Trust Company, defendants named in the Florida proceedings, was questioned by the Delaware Supreme Court and by the respondents because Wilmington Trust Company and Delaware Trust Company were non-residents of the State of Florida and chose not to appear or answer (A 242-243). They were summoned by constructive service of process. Notice of suit was published (F. R. 37, 39) and copies of the complaint were served on them by mail (Supplement to Transcript of Record in case No. 107).

Chapter 48 of Florida Statutes Annotated deals with constructive service of process and provides for constructive service by publication and mail as was done in this case. Section 48.01 of Chapter 48 provides:

> "Service of process by publication may be had . . . for the construction of any will, deed, contract,

or other written instrument and for a judicial declaration or enforcement of any legal or equitable right, title, claim, lien, or interest thereunder."

Section 48.02 of Chapter 48 provides for constructive service of process upon

"any corporation or other legal entity, whether its domicile be foreign, domestic, or unknown."

The Florida Supreme Court held that the constructive service of process on Wilmington Trust Company and on Delaware Trust Company was effective. It said:

"We next consider the contention made on the cross-appeal that the chancellor erred in ruling that he lacked jurisdiction over the persons of certain absent defendants, summoned to appear by constructive service of process. These defendants were the trustee and persons who would benefit under the last power of appointment executed under the trust, and against the will. In *Henderson v. Usher, supra,* 160 So. 9, we upheld constructive service of a citizen of New York, although the trust 'res', consisting entirely of intangible personalty was physically located in New York, and the trust was administered there by the Chase National Bank of New York, as trustee. We held that constructive service was valid in that state of the record because susbtantive jurisdiction existed in the Florida court by virtue of construction of a will, which was also involved, the testator having been domiciled in Florida. We observed that it was not essential that the assets of the trust be physically in this state in order that constructive service be binding upon a non-resident where the problem presented to the court was to adjudicate, inter alia, the status of the securities incorporated in the trust estate and the rights of the non-resident therein. It is entirely con-

sistent with the *Henderson* case to hold, as we do, that the court below erred in ruling that it lacked jurisdiction over the persons of the absent defendants." (A217).

We submit that the Florida Supreme Court properly held that the service on Wilmington Trust Company and Delaware Trust Company, whereby they were summoned to appear by constructive service of process, was in accordance with the latest pronouncements of this Court. The Florida Court had before it for decision the question of what passed under the Florida Will which required a decision as to the validity of the trust agreement and the purported exercises of powers thereunder. The question involved a vital interest of the state in bringing to issue and for final decision interests and claims of its fiduciaries and domicilaries. The Florida Court relied on its earlier decision in *Henderson v. Usher*, 118 Fla. 688, 160 So. 9, which held that an intangible *res*, such as is involved in this case by virtue of Mrs. Donner's Will and her republication of the trust agreement while a resident of Florida, had a constructive situs equivalent to a physical situs in Florida ample to give jurisdiction to the Florida Court.

That the Florida Court was justified in coming to the conclusion it did and that said non-answering defendants were accorded due process is found in the fact that the constructive service of process brought adequate notice to them and they were given an opportunity to be heard with respect to their and other interests in the matter for decision before the Florida Court. In *Mullane v. Central Hanover Bank & Trust Company*, 339 U. S. 306, 311-315, 94 L ed 865, 872-873, this Court, in dealing with a problem similar in quality, said:

> "We are met at the outset with a challenge to the power of the State—the right of its courts to adjudicate at all as against those beneficiaries who

reside without the State of New York. It is contended that the proceedings is one in personam in that the decree affects neither title to nor possession of any res, but adjudges only personal rights of the beneficiaries to surcharge their trustee for negligence or breach of trust. Accordingly, it is said, under the strict doctrine of Pennoyer v. Neff, 95 U. S. 714, 24 L ed 565, the Surrogate is without jurisdiction as to non-residents upon whom personal service of process was not made.'''

* * * *

"Judicial proceedings to settle fiduciary accounts have been sometimes termed in rem, or more indefinitely quasi in rem, or more vaguely still, 'in the nature of a proceeding in rem.' It is not readily apparent how the courts of New York did or would classify the present proceeding, which has some characteristics and is wanting in some features of proceedings both in rem and in personam. But in any event we think that the requirements of the Fourteenth Amendment to the Federal Constitution do not depend upon a classification for which the standards are so elusive and confused generally and which, being primarily for state courts to define, may and do vary from state to state. Without disparaging the usefulness of distinctions between actions in rem and those in personam in many branches of law, or on other issues, or the reasoning which underlies them, we do not rest the power of the State to resort to constructive service in this proceeding upon how its courts or this Court may regard this historic antithesis. It is sufficient to observe that, whatever the technical definition of its chosen procedure, the interest of each state in providing means to close trusts that exist by the grace of its laws and are administered under the supervision of its courts is so insistent and rooted in custom as to establish beyond doubt the right of its courts

interests of the parties to this litigation, even though the Florida Court announced it was applying the law of Florida, would establish the same law for Delaware. This approach was and is patently erroneous. This erroneous approach brought the Delaware Supreme Court to the conclusion that to allow the Florida judgment to be enforced in Delaware would be contrary to the public policy of Delaware. The Delaware Supreme Court failed to grasp the effect and function of the Full Faith and Credit Clause. The Clause, as implemented by the statute, only provides that "judgments", which means, of course, rights established between litigants, have the same force and effect in every Court throughout the United States that they have in the state where they were rendered. 28 U. S. C. § 1738. To allow the Florida judgment to have such force and effect in this litigation would not result in a decision which in any way could be "one of great importance in our law of trusts." (A244) The Florida decision, although binding in this case, could not be considered a mandatory precedent in the law of trusts in Delaware.

The Florida Supreme Court settled once and for all, between the litigants involved here, their rights and made its judgment the law of the case not the law of Delaware.

Another reason given by the Delaware Supreme Court to bolster its position not to accord full faith and credit, was that petitioners are seeking personal judgments against Wilmington Trust Company and Delaware Trust Company (A237-238). That is not the case. It is true that petitioners in their answer, counterclaim and cross-claims, included such prayers, but they were filed before the Florida judgment and were based on the contention that the trust agreement was invalid and, accordingly, judgments *in personam* should be granted against the two trust companies. Petitioners are now seeking to have the Delaware Courts accord full faith and credit to the Florida judgment holding the trust agreement invalid. This is not a request for a judgment *in personam* against either Wilmington Trust

Company or Delaware Trust Company based on the Florida judgment. It would merely result in this Court requiring the Delaware Courts to recognize the judgment of the Florida Court that the trust agreement and the purported exercises of the powers under it were invalid. This should then result in the Delaware Court of Chancery entering a decree holding the trust agreement and the purported exercise of powers thereunder invalid and, thereafter, grant such relief in the Delaware proceedings as would be needed to implement such decision. The judgment *in personam* would be a Delaware judgment *in personam* based on the rights flowing from the recognition by Delaware that Florida had stricken down the trust agreement and the powers.

2. The Supreme Court of the State of Delaware Erred in Holding the Trust Agreement of March 25, 1935, and the Exercise of Certain Powers of Appointment Thereunder, Valid.

In the appeal from the decision of the Florida Supreme Court (No. 107) there will be argued the question of whether or not the Supreme Court of Florida erred in coming to the conclusion that the trust agreement and the purported exercise of powers thereunder were invalid. We do not know whether this Court granted *certiorari* in this case to test the question of whether or not the Delaware Supreme Court erred in holding them valid. If this Court will entertain that question, then, in order to prevent duplicity, we hereby incorporate by reference the arguments which are being made by the appellees in case No. 107. Furthermore, we point out to the Court that both the opinion of the Florida Supreme Court and the opinion of the Delaware Supreme Court deal with the same facts and same authorities and come to diametrically opposite results. We believe the conclusions reached and the result reached by the Florida Supreme Court to be the proper and correct ones and adopt them as our argument in support of our contention that the Delaware Supreme Court erred.

to determine the interests of all claimants, resident or nonresident, provided its procedure accords full opportunity to appear and be heard."

* * *

"Personal service of written notice within the jurisdiction is the classic form of notice always adequate in any type of proceeding. But the vital interest of the state in bringing any issues as to its fiduciaries to a final settlement can be served only if interests or claims of individuals who are outside of the State can somehow be determined. A construction of the Due Process Clause which would place impossible or impractical obstacles in the way could not be justified."

* * *

"The Court has not committed itself to any formula achieving a balance between these interests in a particular proceeding or determining when constructive notice may be utilized or what test it must meet. Personal service has not in all circumstances been regarded as indispensable to the process due to residents, and it has more often been held unnecessary as to nonresidents."

See also *Knox v. Knox* (1912) 87 Kan. 381, 124 P. 409.

The Delaware Supreme Court took the view that since Wilmington Trust Company and Delaware Trust Company did not appear or answer, they were not before the Florida Court and the Florida Court did not acquire jurisdiction over them so as to give its judgment binding force and effect in the State of Delaware. In doing so, that Court applied the very "strict doctrine" of *Pennoyer v. Neff*, 95 U. S. 714, 24 L ed 565. The Court, in doing so, disregarded the development of the doctrine of *Pennoyer v. Neff* as regards judication over non-resident individuals and foreign corporations. See *Annotations*, 94 L ed 1167 and 96 L ed 495, and

see *Expanding Jurisdiction Over Foreign Corporations*, 37 *Cornell Law Quarterly* 458. The latest inroad on the doctrine of *Pennoyer v. Neff* is to be found in a recent decision by the California Supreme Court. In *Atkinson v. Los Angeles Superior Court* (11/5/57) 26 L W 2255, the Court concluded that the non-residence of a trustee under a royalty agreement did not deprive the California Court of jurisdiction to resolve a dispute over the royalties. The Court pointed out that with respect to jurisdiction to tax intangibles, jurisdiction over foreign corporations, and jurisdiction to adjudicate trust obligations, emphasis is no longer placed on actual or physical presence, but on the bearing that local contracts have to the question of over-all fair play and substantial justice.

Certainly over-all fair play and substantial justice require a finding in this case that Wilmington Trust Company and Delaware Trust Company were properly served with adequate notice and had an opportunity to be heard in a matter of vital interest to their beneficiaries. They were only stakeholders and cannot say that there would have been a great burden on them to appear in Florida and allow their beneficiaries to litigate to a finality the basic question of which set of fiduciaries was entitled to the $400,000.00.

We submit, therefore, that the Florida Court had jurisdiction over the persons of said non-answering defendants as well as over the answering defendants and over the subject matter and therefore, that its judgment was entitled to full faith and credit in Delaware.

The Delaware Supreme Court determined, however, not only to base its refusal to accord full faith and credit to the judgment of the Florida Court because of lack of jurisdiction over the persons of some defendants, but went further and did so on the theory that the Florida Supreme Court made a mistake and that, therefore, the Delaware Court could review the entire matter on the merits. Nothing is better settled than that full faith and credit is intended to eliminate an inquiry such as the Delaware Su-

preme Court made after the decision by the Florida Supreme Court. In *Milliken v. Meyer*, 311 U. S. 457, 462, 85 L ed 278, 282-283, this Court pointed out that where one Court has jurisdiction over the person and the subject matter, the judgment is not "open to inquiry." This Court said:

> "In such case the full faith and credit clause of the Constitution precludes any inquiry into the merits of the cause of action, the logic or consistency of the decision, or the validity of the legal principles on which the judgment is based. *Fauntleroy v. Linn*, 210 US 230, 52 L ed 1039, 28 S Ct 641; *Roche v. McDonald*, 275 US 449, 72 L ed 365, 48 S Ct 142, 53 ALR 1141; *Titus v. Wallick*, 306 US 282, 83 L ed 653, 59 S Ct 557. Whatever mistakes of law may underlie the judgment (*Cooper v. Reynolds*, 10 Wall. (US) 308, 19 L ed 931) it is 'conclusive as to all the media concludendi.' *Fauntleroy v. Lum*, *supra* (210 US at p. 237, 52 L ed 1042, 28 S Ct 641)."

In *Riley v. New York Trust Company*, 315 U. S. 343, 348-349, 86 L ed 885, 891, this Court said:

> "This clause of the Constitution brings to our Union a useful means for ending litigation. Matters once decided between adverse parties in any state or territory are at rest. Were it not for this full faith and credit provision, so far as the Constitution controls the matter, adversaries could wage again their legal battles whenever they met in other jurisdictions. Each state could control its own courts but itself could not project the effect of its decisions beyond its own boundaries. Cf. *Pennoyer v. Neff*, 95 US 714, 722, 24 L ed 565, 568. That clause compels that controveries be stilled so that where a state court has jurisdiction of the parties and subject matter, its judgment controls in other states to the same extent as it does in the state where rendered."

The Delaware Supreme Court first determined to review the facts and authorities to determine what law governed the question which had been before the Florida Court concerning the construction of the trust agreement. The Florida Court had determined that since Mrs. Donner had republished the trust agreement in 1949 and in 1950 while a resident of Florida, and had died a resident of Florida leaving a Will tying in the exercises of the powers in 1949 and 1950, that the law of Florida governed. The Delaware Supreme Court rejected the Florida decision on this point and said that the law of Delaware governed because the securities held by Wilmington Trust Company under the terms of the trust agreement were physically in Delaware. We submit that under the Full Faith and Credit Clause the Delaware Supreme Court was without power to make such determination. The Delaware Supreme Court then determined that, on the same facts and after consulting the same authorities, the law announced by the Florida Supreme Court as to the invalidity of the trust agreement and the exercises of the powers was wrong. The Delaware Court did so under the guise of concluding that the law of Delaware differed from the law of Florida as the Supreme Court of Florida had announced it. Both Courts had started on the premise that the facts created a question of first impression (A213, 244). What the Delaware Court did, in effect, was to review and act as an appellate Court in dealing with the judgment of the Florida Supreme Court and to reverse it. It was without power to do so.

We do not challenge the right of the Delaware Court to announce that Delaware law involving the construction of a trust agreement may differ from Florida law and to make that the law of Delaware, but we do challenge the right of the Delaware Court to refuse, as between the parties to this litigation, the rights and interests established in the Florida litigation. The Delaware Supreme Court seems to have been under the impression that to allow the Florida judgment to stand in this case as the definition of the rights and

CONCLUSION.

The action of the Delaware Supreme Court should be reversed.

Respectfully submitted,

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